

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Order to Forfeit a Fine  
and Correction Order Issued to Kids Kare  
Center

**FINDINGS OF FACT,  
CONCLUSIONS, AND**

**RECOMMENDATION**

This matter came on for Hearing before Administrative Law Judge Barbara L. Neilson on July 2, 2003, at the Dakota County Judicial Center in Hastings, Minnesota. The OAH record closed on the date of the hearing.

Kerri Stahlecker Hermann, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the Minnesota Department of Human Services. Roberta Joson, the Director of Kids Kare Center, appeared on behalf of Kids Kare Center, 11125 West Point Douglas Road, Hastings, MN 55033.

**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make a final decision after reviewing the administrative record, and may adopt, reject or modify these Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by the Report to file exceptions and present argument to the Commissioner. Parties should contact the Commissioner of the Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155, to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

**STATEMENT OF ISSUE**

The issue in this case is whether or not the Order to Forfeit a Fine against Kids Kare Center in the amount of \$600 should be affirmed because the Center failed to

initiate background studies for three new employees prior to the time that they began employment.

Based on all of the proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. Kids Kare Center is a day care facility located in the same building with a church and school in Hastings, Minnesota.<sup>[1]</sup>

2. Background studies must be conducted regarding individuals employed by child care providers who have direct contact with children in order to protect the health and welfare of the children and determine if the person is appropriate to work with children. The Department of Human Services provides a red "bubble sheet" for individuals to complete and providers to submit to the Department in order to initiate a background study. The Department requires that such forms be submitted before the person has direct contact with the children served by a child care program. The Department will not accept bubble sheets that have been folded because the bar code cannot be read. Typically, background study bubble sheets are scanned by the Department the same day they are received. If they arrive late in the afternoon, they are placed in a batch to be scanned the next day.<sup>[2]</sup>

3. Joy Rutledge began working full-time for Kids Kare Center as an aide assigned to a specific classroom on or December 2, 2002. To aid in the children's transition to a new care provider, she was paid to come into the Center on a part-time basis for two to three hours approximately two days a week starting on or about November 18, 2002. While working part-time, she was not left alone with the children or counted in terms of the ratios of children to caregivers. Sandy Fuchs began working for Kids Kare Center on December 2, 2002, as an aide who would be a floater who would work in any room that needed someone to fill in for a short time. Kristi Wolkerstorfer also began working for Kids Kare Center on December 2, 2002, as an aide. She was hired to work two hours per day as an afternoon aide.<sup>[3]</sup>

4. Cathy Mears is a Licensor employed by the Licensing Unit of the Department of Human Services. She is assigned, among other things, to oversee Kids Kare Center and conduct inspections and investigations relating to the Center.<sup>[4]</sup>

5. On Friday, December 13, 2002, Ms. Mears visited Kids Kare Center to investigate a complaint the Department had received regarding lack of supervision at the Center. It was alleged that aides were left alone with children and that toddlers were sleeping alone in the nap room. During such an investigation, Ms. Mears typically looks at personnel records to determine if individuals are qualified and have had background studies conducted.<sup>[5]</sup>

6. Roberta Joson, the Director of Kids Kare Center, was not at the Center when Ms. Mears arrived on December 13, 2002. Ms. Mears asked another Center employee to show her staff files, but the files were not in the file cabinet because Ms. Joson had recently pulled out employee files to conduct evaluations. Ms. Mears spoke to Ms. Joson on the phone for approximately 30 minutes. Ms. Joson asked if she should come back to Kids Kare Center, and Ms. Mears said, "no." During their conversation, Ms. Joson said that the staff information was contained in a cardboard box in front of the file cabinets. Ms. Mears could not find the information she needed in the box. She did, however, find two red bubble sheets relating to Ms. Fuchs and Ms. Rutledge. The portion of the bubble sheets that is completed by a staff person was filled out on the forms Ms. Mears found, but the program number and name was not. The forms were not folded. Ms. Joson told Ms. Mears that background study forms relating to Ms. Fuchs and Ms. Rutledge had, in fact, been turned in to the Department of Human Services. She said that Ms. Fuchs and Ms. Rutledge had filled out two forms and that one had been sent to the Department and the other had been kept for the Center's records. Ms. Mears told Ms. Joson that she wanted her to submit the records she needed by Monday, December 16, 2002. Ms. Mears took the red bubble sheets for Ms. Fuchs and Ms. Rutledge with her when she left Kids Kare Center.<sup>[6]</sup>

7. Ms. Mears spoke to Ms. Fuchs during her visit on December 13 and showed her the bubble sheet. Ms. Fuchs told Ms. Mears that she had filled it out. She said that she had not filled out two forms.<sup>[7]</sup>

8. Ms. Mears later called Ms. Rutledge at home. Ms. Rutledge told Ms. Mears that she began working part-time at the Center on November 18, 2002, and full-time on the Monday after Thanksgiving. Ms. Rutledge also stated that she had only filled out one background study form.<sup>[8]</sup>

9. Ms. Joson hand delivered the material requested by Ms. Mears on Monday, December 16, 2002. She also submitted a written complaint alleging that Ms. Mears had engaged in a rude and unprofessional manner during her visit on December 13, 2002. Several Kids Kare Center staff members had complained to Ms. Joson about Ms. Mears' manner and said they felt upset and intimidated during her visit.<sup>[9]</sup> This is the first complaint that has ever been filed relating to Ms. Mears. She has not received any reprimand or other consequences relating to the complaint.<sup>[10]</sup>

10. After Ms. Mears reviewed the personnel records that were submitted by Kids Kare Center on December 16, 2002, she realized that Kids Kare Center also had not submitted a background study form for Ms. Wolkerstorfer.<sup>[11]</sup>

11. On December 17, 2002, Ms. Mears spoke with Beth Simacek, the supervisor of the Department's background study unit, and learned that the Department had not received background study forms relating to Ms. Fuchs, Ms. Rutledge, or Ms. Wolkerstorfer by that date. Ms. Mears placed the program number and name on the bubble sheets she had taken from Kids Kare Center relating to Ms. Fuchs and Ms. Rutledge and submitted them to Ms. Simacek. The bubble sheets submitted by Ms.

Mears had not been folded. Ms. Simacek would not have accepted them if they had been folded. Because the Department's staff had finished scanning the forms for the day, the forms provided by Ms. Mears were not processed until the next day (December 18).<sup>[12]</sup>

12. On December 18, 2002, Ms. Mears learned that duplicate background study forms relating to Ms. Fuchs and Ms. Rutledge and an additional background study form relating to Ms. Wolkerstorfer were being processed in a separate batch scanned by another employee.<sup>[13]</sup> These forms presumably were submitted by Kids Kare Center.

13. On January 3, 2003, Ms. Joson spoke to Peggy Cunningham, Ms. Mears' supervisor, concerning the December 13, 2002, licensing visit. Ms. Joson told Ms. Cunningham that she had all three employees fill out background study forms. Ms. Cunningham's notes indicate that Ms. Joson said that "[o]ne came back with it folded. I sent it and it came back because it was folded and I resubmitted another one . . . . I think these were about Krista Wolkerstorfer and Joy Rutledge."<sup>[14]</sup>

14. On March 25, 2003, the Department issued an Order to Forfeit a Fine and Correction Order to Kids Kare Center. The Department indicated that the order to forfeit a fine was based upon a finding that the Center had not submitted background study forms for three staff persons before they began working in positions allowing direct contact with children, in violation of Minn. Stat. § 245A.04, subd. 3. The Center was fined \$200 per violation and given notice of its right to request a contested case hearing. The Center was also informed of its right to request reconsideration of the attached correction order.<sup>[15]</sup>

15. By letter dated April 2, 2003, Ms. Joson on behalf of Kids Kare Center requested a contested case hearing regarding the \$600 fine. In the letter, Ms. Joson indicated that a note had been placed in Ms. Wolkerstorfer's file indicating that the background study sheet had been sent to the Department and the Center was awaiting the final clearance. Ms. Joson had not told Ms. Mears that on any prior occasion. In addition, the letter indicated that Ms. Joson had sent a background study in more than a year ago that was folded, and the form was returned to her with a letter stating that there could be no folds on the form and the form would have to be resubmitted without folds. Ms. Joson indicated that, since that time, she would not accept a folded form from an employee. The letter implied that Ms. Rutledge and Ms. Fuchs had originally submitted folded forms, had been given another form to complete, and the folded forms had been retained in the Center's files. Ms. Joson further stated that she recalled placing all three studies together in an envelope for mailing and the Assistant Director of the Center, Sharon Kortus, recalled mailing the envelope, and background study clearances had been received back for all three employees.<sup>[16]</sup>

16. The Notice of and Order for Hearing initiating the present contested case proceeding was served on Kids Kare Center on May 29, 2003. The hearing occurred as scheduled in Hastings on July 2, 2003.

17. The parties waived the requirement set forth in Minn. Stat. § 245A.08, subd. 4, requiring service of the report of the Administrative Law Judge by certified mail and agreed that service by first class mail was acceptable.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper and timely notice of the hearing in this matter and has complied with all substantive and procedural requirements of law and rule.

3. Minn. Stat. § 245A.04, subd. 3(a)(1), mandates that the Commissioner of Human Services conduct a background study of the individuals specified in subd. 3(c), which include “current employees or contractors of the applicant who will have direct contact with persons served by the . . . program.” The statute requires that completed background study forms must be submitted to the Commissioner “before individuals . . . begin positions allowing direct contact in any licensed program.” “Direct contact” is defined in Minn. Stat. § 245A.04, subd. 3(b)(4), to mean “providing face-to-face care, training, supervision, counseling, consultation, or medication assistance to persons served by the program.”

4. Dakota County Social Services issued a correction order to Kids Kare Center under Minn. Stat. § 245A.06, subd. 1. Correction orders are subject to review by the Department of Human Services through the reconsideration process and are therefore not subject to a contested case hearing.<sup>[17]</sup> The only reviewable issue here is the imposition of the fine.

5. Minn. Stat. § 245A.07, subd. 1 provides that the Commissioner of Human Services may impose a fine against a license holder who does not comply with applicable rules or law. When applying sanctions, the Commissioner must consider “the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.”

6. Minn. Stat. § 245A.07, subd. 3, states that the Commissioner may impose a fine if a license holder fails to comply fully with applicable law or rule.

7. Minn. Stat. § 245A.07, subd. 3(b)(4), provides that fines must be assessed in the amount of \$200 for “each occurrence of a violation of law or rule governing matters of health, safety, or supervision, including but not limited to . . . failure to submit a background study.”

8. It is the Commissioner's burden to first demonstrate reasonable cause to believe that the license holder failed to comply fully with applicable law or rule. If the Commissioner demonstrates reasonable cause existed, then the license holder must show by a preponderance of the evidence that she was in full compliance with the law or rule at the time of the alleged violations.<sup>[18]</sup>

9. The Department demonstrated reasonable cause to believe that Kids Kare Center failed to comply fully with the statute by failing to submit completed background study forms for three employees before they began positions allowing direct contact with children enrolled in the Center. Kids Kare Center did not show by a preponderance of the evidence that it was in full compliance with this requirement.

10. These Conclusions are reached for the reasons discussed in the Memorandum below, which is hereby incorporated in these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RESPECTFULLY RECOMMENDED: that the Commissioner affirm the imposition of a \$600 fine against Kids Kare Center for failure to submit background study forms for three employees before they began positions allowing direct contact with children.

Dated: August 1, 2003

/s/ Barbara L. Neilson

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BARBARA L. NEILSON  
Administrative Law Judge

### **NOTICE**

Pursuant to Minn. Stat. § 14.62, subd. 1, the Minnesota Department of Human Services is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape recorded (2 tapes).

### **MEMORANDUM**

The Department demonstrated reasonable cause to believe that Kids Kare Center had not complied with the background study statute by showing that completed background study forms relating to three employees who began full-time work on December 2, 2002, were not received until December 17 or 18, 2002. The statute requires that such forms be submitted by license holders such as Kids Kare Center *before* an employee begins a position allowing direct contact with persons served by the program (here, children enrolled in Kids Kare Center). Ms. Fuchs and Ms. Wolkerstorfer began full-time employment as aides on December 2, 2002. Ms. Rutledge also began full-time employment as an aide on December 2, 2002, but was previously hired on a part-time basis starting on November 18, 2002, in order to become familiar with the children in her assigned room and ease their transition. Ms. Rutledge thus was in a position allowing direct contact and face-to-face care by November 18, 2002. It does not matter that Ms. Rutledge was not counted during her part-time employment for purposes of the adult:child ratio or was not left solely in charge during her part-time employment. The fact remains that she was an employee of the Center who was being paid to play with the children and get to know them prior to the start of her full-time position, and was thereby providing face-to-face care within the meaning of the statute. As a result, the Center should have submitted a completed background study form with respect to Ms. Rutledge before she began her part-time employment on November 18, 2002, and completed background study forms with respect to Ms. Fuchs and Ms. Wolkerstorfer before they began full-time employment on December 2, 2002. <sup>[19]</sup>

Kids Kare Center failed to show by a preponderance of the evidence that it did, in fact, fully comply with the statutory requirements pertaining to background studies. The testimony of the Director and Assistant Director that all three forms were mailed on December 2 amounts to an admission that Ms. Rutledge's form was untimely because it was not submitted prior to November 18. Moreover, the assertion that the forms were submitted on December 2 was not persuasive due to inconsistencies between that testimony and the testimony of others, as well as prior statements by the Director. For example, the Director initially told Ms. Mears on December 13 that she had Ms. Fuchs and Ms. Rutledge fill out two forms and she sent one in and retained the other in the Center's files. The Director did not tell Ms. Mears that this was done because the original forms these individuals had submitted were folded. She did, however, tell Ms. Mears' supervisor, Ms. Cunningham, during a telephone conversation on January 3, 2003, that the forms for Ms. Rutledge and Ms. Wolkerstorfer had been mailed in, were returned by DHS because they were folded, and were later resubmitted. In fact, Ms. Mears and Ms. Simacek both testified that the forms relating to Ms. Rutledge and Ms. Fuchs were *not* folded and would not have been later processed by the Department if they had been, and Ms. Fuchs and Ms. Rutledge denied having filled out two forms when Ms. Mears talked to them during her investigation on December 13.

The Director also did not mention to Ms. Mears during their conversation on December 13 that she makes a notation on a slip of paper in her personnel files when a background study form is sent and removes the note when the blue clearance sheet is returned by DHS. She testified regarding this practice for the first time at the hearing,



stating that she “didn’t think about” telling Ms. Mears of this documentation. When questioned about these notations, she initially indicated that she “didn’t think to bring them” to the hearing and later testified that she no longer had these slips of paper. Ms. Mears did not see any slips or notes showing background study forms had been sent in for Ms. Fuchs or Ms. Rutledge. Moreover, the Assistant Director testified that she didn’t make any record regarding the mailing of the forms to DHS and did not mention any notation made by the Director. Based on these inconsistencies, and the fact that the DHS did not receive the forms for processing until December 17 or 18, the Administrative Law Judge is not persuaded that Kids Kare Center submitted the completed forms to DHS on December 2, 2002.<sup>[20]</sup>

Finally, the Administrative Law Judge is not persuaded that the fine was improper because the DHS Licenser was biased against Kids Kare Center.<sup>[21]</sup> The Licenser testified that it is not uncommon for her to recommend that fines be assessed against licensees who failed to obtain background studies and that she has done so in more than 20 instances. In fact, the governing statute requires that a \$200 fine be assessed for each instance in which there is a failure to provide a background study. Moreover, there was evidence that it is not unusual for the Licenser to call employees at home during a complaint investigation and she typically takes background study forms with her if she finds them at a licensee’s site.

Based upon careful consideration of all of the evidence, the Administrative Law Judge concludes that Kids Kare Center failed to submit completed background study forms regarding three employees before they began positions allowing direct contact with the children enrolled in Kids Kare Center, and a \$600 fine for those three violations is appropriate.

## **B.L.N.**

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<sup>[1]</sup> Testimony of Joson, Kortus.

<sup>[2]</sup> Testimony of Simacek, Mears, Joson; Ex. 7.

<sup>[3]</sup> Testimony of Mears, Joson, Kortus; Ex. 1.

<sup>[4]</sup> Testimony of Mears.

<sup>[5]</sup> Testimony of Mears.

<sup>[6]</sup> Testimony of Mears, Joson, Kortus. The Administrative Law Judge takes administrative notice that Thanksgiving fell on November 28, 2002, and the Monday after Thanksgiving was December 2, 2002.

<sup>[7]</sup> Testimony of Mears.

<sup>[8]</sup> Testimony of Mears.

<sup>[9]</sup> Testimony of Joson, Mears; Ex. 6.

<sup>[10]</sup> Testimony of Mears.

<sup>[11]</sup> Testimony of Mears; Ex. 2.

<sup>[12]</sup> Testimony of Mears, Simacek; Ex. 2.

<sup>[13]</sup> Testimony of Mears, Simacek.

<sup>[14]</sup> Testimony of Mears; Ex. 3.

<sup>[15]</sup> Ex. 4; Testimony of Mears, Joson.

<sup>[16]</sup> Ex. 5.

<sup>[17]</sup> Minn. Stat. § 245A.06, subd. 2.

<sup>[18]</sup> Minn. Stat. § 245A.08, subd. 3(a).



<sup>[19]</sup> Although Kids Kare Center argued at the hearing that, during Ms. Rutledge's part-time employment, she was acting in the same manner as a parent or grandparent visiting the program, the Minnesota Legislature elected to treat employees of licensed programs differently than volunteers who merely visit a program for purposes of required background studies. It should be noted that even volunteers who have direct contact with persons served by the program to provide program services must be subjected to background studies if the contact is not under continuous, direct supervision of applicant or its employees. See Minn. Stat. § 245A.04, subd. 3(c)(4).

<sup>[20]</sup> Even if the completed forms had, in fact, been placed in the outgoing church mail during the afternoon of December 2, 2002, the first day on which Ms. Fuchs and Ms. Wolkerstorfer were employed, it is questionable whether this would satisfy the statutory requirement that the license holder must submit the completed background study forms to the commissioner *before* the individuals begin positions allowing direct contact with persons served by the licensed program.

<sup>[21]</sup> The sole issue presented in this contested case proceeding has to do with whether or not the order to forfeit a fine should be affirmed. This is not the proper venue to consider whether the complaint of Kids Kare Center that the Licenser was rude or unprofessional during her visit on December 13, 2002, was well founded.